IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-1672-WJM-SKC

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY;
BOARD OF COUNTY COMMISSIONERS OF SAN MIGUEL COUNTY; and
CITY OF BOULDER,

Plaintiffs,

v.

SUNCOR ENERGY (U.S.A.) INC.;
SUNCOR ENERGY SALES INC.;
SUNCOR ENERGY INC.; and
EXXON MOBIL CORPORATION,

Defendants.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR A STAY OF THE REMAND ORDER PENDING APPEAL

This Court's September 5, 2019, Order granting Plaintiffs' Motion to Remand ("Remand Order") correctly rejected each of Defendants' arguments for federal jurisdiction, including their incorrect attempt to invoke the federal officer removal statute, 28 U.S.C. § 1442. ECF No. 69 at 55. Defendants' Motion for a Stay of the Remand Order Pending Appeal, ECF No. 75, merely repeats the same arguments this Court already found meritless. Defendants present no compelling reason as to why they are likely to convince the Court of Appeals that this Court was wrong, nor that they are likely to suffer any injury absent a stay. The district court in *Mayor & City Council of Baltimore v. BP P.L.C,* already rejected the same arguments as "unavailing" in concluding "a stay is not warranted" pending appeal, *Mayor & City Council of Baltimore v. BP P.L.C, ("Baltimore"),* No. ELH-18-2357, 2019 U.S. Dist. LEXIS 128168 at *17 (D. Md. July 31, 2019). Just this month the district court in Rhode Island also denied the defendants' motion for a stay pending appeal. *State of Rhode Island v. Shell Oil Products Co., LLC et al,* No. 1:18-cv-00395, Text Order Den. Mot. To Stay Remand Order Pending Appeal (D. R.I. Sept. 11, 2019). Defendants here, too, fall far short of the showing required to warrant a stay and the motion should be denied.

Defendants' appeal will be limited to their argument that federal officer jurisdiction is present under Section 1442. Their Motion points to no errors in the Remand Order on this issue, but merely repeats the same arguments already rejected by this Court – as well as every other district court to consider it in similar climate liability cases. This does not meet their burden to show a likelihood of success on the merits of their appeal.

Their remaining grounds for removal are plainly "unreviewable" under 28 U.S.C. § 1447(d), and thus cannot support a likelihood of prevailing on appeal. While Defendants may try to use their federal officer argument to bootstrap their other grounds for removal into their appeal, the Tenth Circuit (and nearly every other Circuit) has held that appellate review of remand orders is limited to

only the portion that falls within an exception to Section 1447(d). The presence of one appealable ground does not make other arguments reviewable. But even if the entirety of the Remand Order were subject to appellate review, Defendants fail to show they have a likelihood of success on any of their other jurisdiction arguments, as they add nothing to the arguments this Court already rejected.

Even if they could show a likelihood of prevailing, Defendants cannot show irreparable harm. Their assertion of harm absent a stay is at most speculative and plainly insufficient. Preliminary litigation proceedings in state court pose little or no burden to Defendants, while further delay of Plaintiffs' case – already delayed more than a year due to Defendants' removal petition – is substantial. Defendants have not made the requisite showing to warrant a stay pending appeal.

ARGUMENT

A stay pending appeal is an "intrusion into the ordinary processes of administration and judicial review." *Nken v. Holder,* 556 U.S. 418, 427 (2009). It is "an extraordinary remedy that should not be granted unless the applicant clearly is entitled to such relief." *Pueblo of Pojoaque v. New Mexico,* 233 F. Supp. 3d 1021, 1141 (D.N.M. 2017) (internal quotations omitted). Such a stay "is not a matter of right, even if irreparable injury might otherwise result." *Nken,* 556 U.S. at 433. Defendants bear the burden to show the circumstances justify a stay. *Id.* at 433-34.

The Court must consider whether (1) Defendants have made a "strong showing" that they are "likely to succeed on the merits" on appeal; (2) Defendants will be "irreparably injured absent a stay," (3) the stay would injure other parties to the proceedings, and (4) "where the public interest lies." *Id.* at 426.[1] The first two factors are "most critical." *Id.* at 434. Defendants have "a heavy burden" to show the order was "erroneous on the merits," and that they "will suffer irreparable

[1] The Tenth Circuit has held that the test for a stay pending appeal is the same as for a preliminary injunction. *See, e.g. Warner v. Gross,* 776 F.3d 721, 728 (10th Cir. 2015).

injury" absent a stay. *Id.* at 439 (Kennedy, J., concurring); *Pojoaque*, 233 F. Supp. 3d at 1140 (same).

A. Defendants are not likely to succeed on the merits of their appeal

The first factor requires Defendants to make "a strong showing" that they are likely to succeed on the merits; "[i]t is not enough that the chance of success . . . be better than negligible" or "possib[le]." *Nken,* 556 U.S. at 434 (internal quotations and citations omitted).

To win their appeal, Defendants will have to clear a number of hurdles. First, they must prevail on their argument that, as private oil companies, they qualify as persons acting under officers of the United States in the course of conduct at issue here, an argument this Court correctly rejected. If they cannot win this unfounded argument, they face the even more difficult task of convincing the Tenth Circuit to go against its previous rulings, and those of nearly every other Circuit, and allow review of Defendants' other bases for removal. Even if the Tenth Circuit were to review every argument Defendants advanced, they are unlikely to succeed because this Court's ruling that there is no federal jurisdiction on any ground is correct. Plaintiffs have pled exclusively state law claims, for injuries suffered entirely in Colorado, and their claims should be heard in Colorado state court.

Defendants suggest that the Court may apply a relaxed standard for likelihood of success, which can be satisfied by raising questions "so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." ECF No. 75 at 3 (quoting *FTC v. Mainstream Marketing Services, Inc.*, 345 F.3d 850, 852-53 (10th Cir. 2003)). This argument relies on a line of now-invalid Tenth Circuit cases that allowed for a "relaxed" probability of success standard found in *Mainstream Mktg,* 345 F.3d at 853. Even if this were the test, Defendants' showing as to the harm factors falls well short. But it is not the test. The Tenth Circuit has recently clarified that "any modified test which relaxes one of the prongs" and "thus deviates from the standard test is impermissible." *Dine Citizens Against Ruining Our Env't v. Jewell,* 839 F.3d

1276, 1282 (10th Cir. 2016). *Accord Pojoaque,* 233 F.Supp. 3d at 1093, 1114 (the "relaxed" test is "likely abrogated with respect to both injunctions and stays pending appeal"); *Grogan v. Renfrow*, No. 19-CV-248, 2019 U.S. Dist. LEXIS 110136, at *10-11 (N.D. Okla. July 2, 2019). Nonetheless, even if this were the applicable test, there is no serious question raised by the only reviewable ground for removal – the federal officer statute.

1. Appellate review of the Remand Order is limited to the federal officer statute

Review of orders remanding removed cases to state court is "substantially limited" by statute. *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 229 (2007). The removal statute provides:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 [federal officer removal] or 1443 [civil rights cases] of this title shall be reviewable by appeal or otherwise.

28 U.S.C. § 1447(d). "Limiting appellate review of remand orders supports 'Congress's longstanding policy of not permitting interruption of the litigation of the merits of a removed case.'" *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 797 F.3d 800, 805 (10th Cir. 2015) (quoting *Powerex,* 551 U.S. at 238)). The Supreme Court has "noted the desirability of avoiding '[l]engthy appellate disputes about whether an arguable jurisdictional ground invoked by the district court was properly such.'" *Id.* (quoting *Powerex,* 551 U.S. at 234).

Defendants admit that most circuits hold that appellate review of remand orders is limited only to the specific ground for removal "that triggered the exception in Section 1447(d)" – in this case, federal officer removal under Section 1442. ECF No. 75 at 5. Defendants erroneously state that the Tenth Circuit "has never squarely addressed the scope of appellate review in appeals authorized by Section 1447(d)." *Id.* at 6. In fact, the Tenth Circuit has followed the majority rule, holding that it lacks jurisdiction to review "the portion of [a] remand order" that concerns a basis

for removal not expressly excepted from Section 1447(d). *Sanchez v. Onuska,* No. 93-2155, 1993 U.S. App. LEXIS 20722, at *3-4 (10th Cir. Aug. 13, 1993) (per curiam). A case involving civil rights removal under 28 U.S.C. § 1443, *Sanchez* held that other grounds for removal were "not reviewable" on appeal. *Id.* Sections 1442 and 1443 are treated identically in Section 1447(d).[2] Although *Sanchez* is unpublished, there is no reason to believe that the Tenth Circuit would depart from this position when it accords with the majority rule.

Defendants cite *Coffey v. Freeport McMoran Copper & Gold,* 581 F.3d 1240, 1247 (10th Cir. 2009), arguing it "strongly suggests" the Tenth Circuit would review the Court's "entire order," ECF No. 75 at 6, but *Coffey* did no such thing. Unlike *Sanchez,* which turned on the Tenth Circuit's reading of Section 1447(d), *Coffey* turned on the language in the Class Action Fairness Act (CAFA) providing that "notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand." 581 F.3d at 1247 (quoting 28 U.S.C. § 1453(c)(1)). The Tenth Circuit observed that Section 1453(c)(1) contained "no language limiting the court's consideration solely to the CAFA issues in the remand order." *Id.* It expressly authorized appellate review; by contrast, the plain language of Section 1447(d) makes remand orders "not reviewable," with two narrow exceptions. And even though the Tenth Circuit found it had discretion to review the whole order, it declined to do so, reasoning that since there would have been no appellate jurisdiction over the remand order absent the CAFA issue, review of the non-CAFA issue would "not fit within the reasons behind §1453(c)(2)," *i.e.* to "develop a body of appellate law interpreting [CAFA] without unduly delaying the litigation of class actions." *Id. Accord Parson v. Johnson & Johnson*, 749 F.3d 879, 892-93 (10th Cir. 2014) (declining to exercise discretion to

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[2] There is comparatively more caselaw on Section 1443 because it has been an exception to non-reviewability since 1964, while the Section 1442 exception was only added in 2011.

review non-CAFA basis of remand order in part because "absent our jurisdiction over the CAFA remand order, there would have been no freestanding appellate jurisdiction to review the district court's ruling on diversity jurisdiction"). Thus, *Coffey* suggests the Tenth Circuit would be *unlikely* to review aspects of a remand order that would otherwise be unreviewable.

Coffey also disposes of Defendants' claim that the Supreme Court's decision in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996) – regarding the scope of interlocutory appeals – has any great significance here. As *Coffey* noted, while *Yamaha* held that appellate jurisdiction extended to the entire order certified for interlocutory appeal, this is not mandatory. *Coffey*, 581 F.3d at 1247. So even if Defendants were correct that the Court of Appeals has jurisdiction to consider issues beyond the federal officer statute, *Yamaha* does not require such consideration, and *Coffey* establishes that the Tenth Circuit is unlikely to go beyond Section 1442.

At least eight other Circuits have held – five of them post-*Yamaha* – appellate jurisdiction is limited to the portion of the remand order tied to an express exception in Section 1447(d). *See City of Walker v. Louisiana*, 877 F.3d 563, 567 n.2 (5th Cir. 2017) (noting that the court had previously "rejected" arguments "that the § 1447(d) exception for federal officer jurisdiction allows us to review the entire remand order");[3] *Jacks v. Meridian Res. Co., LLC,* 701 F.3d 1224, 1229 (8th Cir. 2012) (holding appellate court had jurisdiction to review remand order as to federal officer removal, but under § 1447(d), "lack[ed] jurisdiction to review the . . . determination concerning the availability of federal common law"); *see also State Farm Mutual Auto. Ins. Co. v. Baasch,* 644 F.2d 94, 96, 97 (2d

[3] *Decatur Hosp. Auth. v. Aetna Health, Inc.*, 854 F.3d 292 (5th Cir. 2017), does not hold otherwise. *City of Walker* cites and harmonizes *Decatur*; *Decatur* held only that a remand based on a *procedural defect* (timeliness) was reviewable in its entirety where it included a Section 1442 argument. *Id.* at 296. *Decatur* acknowledged that where, as here, remand was based on lack of subject matter jurisdiction under Section 1447(c), review is limited to the Section 1442 or 1443 grounds. *Id.* at 296-97.

Cir. 1981) (holding appellate jurisdiction was limited to § 1443 grounds for removal); *Davis v. Glanton,* 107 F.3d 1044, 1047 (3d Cir. 1997) (same); *Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976) (same), *see also Lee v. Murraybey,* 487 F. App'x 84, 85 (4th Cir. 2012); *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530, 534 (6th Cir. 1970); *Patel v. Del Taco Inc,* 446 F.3d 996, 998 (9th Cir. 2006) (same); *Alabama v. Conley,* 245 F.3d 1292, 1293 n.1 (11th Cir. 2001) (same). *Accord Baltimore*, 2019 U.S. Dist. LEXIS 128168 at *15 (noting majority rule in holding that "only the issue of federal officer removal would be subject to review on defendants' appeal of the remand").

Defendants point instead to the Seventh Circuit's decision in *Lu Junhong v. Boeing Co.,* 792 F.3d 805, 811 (7th Cir. 2015). There, the court analogized Section 1447(d)'s exception for Section 1442 to appellate review under CAFA.[4] Yet the court did not address the existing body of case law – including an unpublished Seventh Circuit case – addressing the exact same question with respect to the analogous exception for Section 1443. *See, e.g. City of Jeffersonville, Ind. v. Wright, No.* 93-1055, 1994 U.S. App. LEXIS 7661, at *4 (7th Cir. Mar. 14 1994) (holding court's jurisdiction to review remand order was limited to Section 1443, and did not include other aspects of order).

Lu Junhong is unpersuasive on its face. It hinges on the term "order" in Section 1447(d), reasoning that the entire "order" is appealable if removal invoked Section 1442. Section 1447(d) does not say that remand orders are reviewable if removal was based *partly* on Section 1442; it allows appeal only where the case "was removed pursuant to section 1442." *Lu Junhong*'s all-or-nothing approach more properly results in nothing – *i.e.*, if other grounds for removal are asserted, then the case was not "removed pursuant to section 1442" and no appeal is permitted at all. Further, *Lu*

[4] *Lu Junhong* also relied on *Yamaha*, as Defendants do, ECF No. 75 at 4-5, but it concerned certification of interlocutory appeals under 28 U.S.C. §1292(b) which is even less relevant. Section 1292(b) expressly *authorizes* appellate review of orders *certified* by the district court, while § 1447(d) explicitly bars review of any kind, with only two specified, narrow exceptions.

Junhong would make a substantive appeal right dependent on the *form* of the district court's remand order. If a court were to issue two orders – one addressing Section 1442, and one addressing Section 1441 – there would be no argument that the Section 1441 order is unreviewable.

The Seventh Circuit essentially stands alone in its analysis. Defendants claim that the Sixth Circuit supports their position, but that is not entirely correct. As noted above, the Sixth Circuit followed the majority rule with respect to Section 1443 in *Appalachian Volunteers*. The decision in *Mays v. City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017), purports to follow *Lu Junhong*, but does not acknowledge *Appalachian Volunteers* – most likely because the parties did not litigate the issue. The appellees conceded that the entire remand order was reviewable by virtue of a Section 1442 argument. *See* Pls.-Appellees' Corrected Br. at 1, *Mays v. City of Flint*, No. 16-2484, Dkt. 50 (6th Cir. Feb. 1, 2017). *Mays* thus cannot be considered persuasive.

Published decisions from eight circuits – and an unpublished decision from the Tenth Circuit itself – unanimously confirm that appellate review here will be limited to the federal officer issue. The one outlier, the Seventh Circuit's decision in *Lu Junhong*, is not the law of this Circuit and does not create any likelihood that other grounds for removal will be reviewed.

2. Defendants' are not likely to succeed on appeal of the federal officer basis for federal jurisdiction; nor are they likely to succeed on any other basis even if the Tenth Circuit considers the whole Remand Order

Defendants assert this case raises "complex and novel questions regarding jurisdiction" that have "divided multiple district courts," ECF No. 75 at 7. As to their one appealable ground, however, that is not true; *no* district court has accepted their argument. Defendants assert that their appeal presents the "substantial question" of whether there is federal officer removal jurisdiction, but they merely reiterate the arguments for federal officer jurisdiction this Court already rejected and give no reason to believe the Tenth Circuit would decide differently. *See* ECF No. 75 at 8. Their

"attempt to re-hash the same argument[s] does not demonstrate a likelihood of success on appeal." *Mainstream Mktg. Servs. v. FTC*, 284 F. Supp. 2d 1266, 1275 (D. Colo. 2003). *See also Smith v. United States,* No. 13-cv-01156, 2015 U.S. Dist. LEXIS 15876, at *4-6 (D. Colo. Feb. 10, 2015).

Aside from citing their prior briefing, Defendants argue only that "not *all* of the relevant activities need take place under [federal] control." ECF No. 75 at 8 (emphasis original). But the Court did not hold otherwise; it found Defendants failed to show that "they acted under the direction of a federal officer" at all, *id.* at 45; *see also id.* at 46, 47, and failed to show "a causal connection" between work allegedly performed under federal control and Plaintiffs' claims. *See id.* at 45, 47-48. Defendants' cases are of no help. ECF No. 75 at 8. Federal control over the defendants' conduct was obvious for substantial periods of time, and they established the necessary causal nexus between a significant period of federal control and the claims that is wholly absent here. Indeed, these cases demonstrate the high degree of federal control needed to invoke this statute. In one case, toxic exposure claims arose from "production, manufacture and transport" of chemical at plant "overseen by the federal government to a very specific degree" for "at least ten years" of the exposure period. *Reed v. Fina Oil & Chem. Co.,* 995 F. Supp. 705, 712 (E.D. Tex. 1998). In the other, injury occurred at a plant while a federal contractor was performing its "federal duty" to "operate[ ] [that] federal government-owned facility, exclusively for the government, under the oversight and ultimate control of" government officers. *Lalonde v. Delta Field Erection*, No. 96-3244-B, 1998 U.S. Dist. LEXIS 23946, at *29-30, 20 (M.D. La. Aug. 5, 1998). These cases highlight the correctness of the Court's decision. Just as in *Baltimore*, Defendants "have not demonstrated a substantial likelihood of success on the merits of this issue, or even that removal of this case under [Section 1442] raises a complex, serious legal question." 2019 U.S. Dist. LEXIS 128168, at *15.

Even if the Tenth Circuit were to review Defendants' other alleged bases for removal, they

are meritless; Defendants have not shown they are likely to prevail. As to federal common law, Defendants rely on the same district court decisions they cited before. *See* ECF No. 75 at 7 (citing *California v. BP plc* ("*CA I*"), Nos. 17-6011 & 17-6012, 2018 WL 1064293 (N.D. Cal. Feb 27, 2018); *City of Oakland v. BP plc* ("*CA II*"), 325 F. Supp. 3d 1017 (N.D. Cal. 2018); *City of New York v. BP plc,* 325 F. Supp. 3d 466 (S.D.N.Y. 2018)). This Court already considered and rejected the *CA I* decision as "not persuasive," ECF No. 69 at 14, "disagree[ing]" with its conclusion "that removal jurisdiction is proper because the case arises under federal common law." *Id.* at 15. The *City of New York* case followed the rationale of *CA I* and *CA II* in dismissing New York's claims, but did not address federal jurisdiction or removal jurisdiction. *Id.* at 13-14.

Although the court in *CA I* based its decision primarily on *American Electric Power Co., Inc. v. Connecticut,* 564 U.S. 410 (2011), and *Kivalina v. Exxon Mobil Corp.,* 696 F.3d 849 (9th Cir. 2012), this Court noted that, unlike the purely state law claims here, the plaintiffs in *AEP* and *Kivalina* "expressly invoked federal claims." ECF No. 69 at 14. Both cases addressed interstate emissions "which are not at issue here," neither addressed "whether state law claims were governed by federal common law," and "neither implicated nor discussed" removal jurisdiction. *Id.* This Court already concluded that *CA I* erred in disregarding the well-pleaded complaint rule, *id.* at 15, and "failed to discuss or note the significance of the difference between removal jurisdiction, which implicated the well pleaded complaint rule, and federal jurisdiction that is involved at the outset such as in *AEP* and *Kivalina*." *Id.* at 16. The *CA I* decision was further undermined by that court's subsequent ruling on the defendants' motion to dismiss holding that federal law provided no claim to the plaintiffs in *CA II,* 325 F. Supp. 1017, which is currently on appeal.

Nor do Defendants make any meaningful showing that there is federal question jurisdiction under *Grable.* Defendants merely assert (again) that they "raise a legitimate dispute as to whether

plaintiffs' claims necessarily present a federal issue by, among other things, calling into question the balance struck by the federal government between environmental and energy-related concerns." ECF No. 75 at 8 (citing *Grable & Sons Menal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 312-313 (2005)). Defendants cite only *Grable* and the arguments in their brief opposing remand, *id.* at 8-9; they add nothing to the arguments already made. As this Court already found in rejecting *Grable* jurisdiction, "Plaintiffs' state law claims do not have as an element any aspect of federal law or regulations," they "do not allege that any federal regulation or decision is unlawful, or a factor in their claims, nor are they asking the Court to consider whether the government's decisions to permit fossil fuel use are appropriate." ECF No. 69 at 25. *Accord id.* at 25-27 (explaining *Baltimore*, *State of Rhode Island* and *San Mateo* reached the same conclusion as to *Grable* jurisdiction).

As to the other alleged bases for removal, Defendants attempt no argument *at all* as to likelihood of success on appeal beyond referencing the "additional reasons asserted at greater length" in Defendants' prior brief. ECF No. 75 at 9. It is not hard to see why. There is obviously no complete preemption and this case has nothing to do with federal enclaves, the Outer Continental Shelf or bankruptcy. Mere citation to arguments already considered and rejected plainly fails to make the required "strong showing" for likelihood of success. A stay is not warranted.

B. Defendants will not suffer irreparable harm absent a stay; their showing falls far short of what courts require to justify a stay pending appeal

"To constitute irreparable harm, an injury must be certain, great, actual 'and not theoretical.'" *United States v. Wilhite*, No. 00-cr-00504, 2018 U.S. Dist. LEXIS 3358, at *2-3 (D. Colo. Jan. 9, 2018) (quoting *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003)). "Simply showing some possibility of irreparable injury" is insufficient. *Nken*, 556 U.S. at 434-35.

Defendants allege it would be "unnecessarily burdensome" to "simultaneously have to brief

and argue federal jurisdictional issues in the Tenth Circuit while litigating plaintiffs' claims in Colorado state court." ECF No. 75 at 9. "[I]njuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough" to show irreparable harm. *Sampson v. Murray,* 415 U.S. 61, 90 (1974). *See also Trout Unlimited v. Water Supply & Storage Co.,* No. 96-WY-2686-WD, 2005 U.S. Dist. LEXIS 38045, at *5-6 (D. Colo. Aug. 31, 2005). Courts consistently hold that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Bd. v. Bannercraft Clothing Co.,* 415 U.S. 1, 24 (1974). "[N]early all courts" have so found. *Mohamed v. Uber Techs.,* 115 F. Supp. 3d 1024, 1032-33 (N.D. Cal. 2015); *accord Gilleland v. City of Okla. City, No.* CIV-16-808, 2017 U.S. Dist. LEXIS 12280, at *2-3 (W.D. Okla. Jan. 30, 2017). Indeed, in a similar case where a private corporation was arguing removability under the federal officer statute, a district court rejected the same assertion of harm, noting that while "Defendants will incur some additional costs of pursuing an appeal [§ 1442 removal] without a stay," "those costs are unlikely to amount to irreparable injury." *Washington v. Monsanto Co.,* 2018 U.S. Dist. LEXIS 48501 (W.D. Wash. 2018). Moreover, assertions that "state proceedings that occur could be potentially duplicative, mooted or otherwise wasteful if the [Appellate Court] rules in [Defendants'] favor" are "simply too speculative to rise to the level of 'irreparable injury.'" *Phx. Glob. Ventures, LLC v. Phx. Hotel Assocs.*, 2004 U.S. Dist. LEXIS 24079, at *8 (S.D.N.Y. Nov. 23, 2004) (quoting *Jayaraj v. Scappini*, 66 F.3d 36, 39 (2d Cir. 1995)). *See also Hall v. Dixon,* No. H-09-2611, 2011 U.S. Dist. LEXIS 18645, at *8-9 (S.D. Tex. Feb. 25, 2011) (same).

Defendants rely on an unpublished out-of-circuit case, *Lafalier v. Cinnabar Service Co.,* but it turned on the particular circumstances shown there – without a stay, defendants would have had to comply with "numerous discovery requests" that had already been filed, while simultaneously litigating an appeal that raised "substantial issues under CAFA." No. 10-cv-5, 2010 U.S. Dist.

LEXIS 42447 at *8-9 (N.D. Okla. Apr. 30, 2010). Here, by contrast, there is "no evidence that pursuing the appeal and state-court litigation will be particularly taxing." *Hall,* 2011 U.S. Dist. LEXIS 18645, at *9 (distinguishing *Lafalier,* 2010 WL 1816377, at *2).

Defendants' assertion they could be burdened if discovery occurs in state court and they prevail on appeal is speculative at best. ECF No. 75 at 9. Unlike in *Lafalier,* where discovery was already underway, the state court proceedings here have not even had the chance to begin. Where, as here, a case is "in its earliest stages," "the risk of harm" to Defendants "if discovery proceeds is low." *Cesca Therapeutics, Inc. v. SynGen Inc.,* No. 2:14-cv-2085, 2017 U.S. Dist. LEXIS 48265, at *13-14 (E.D. Cal. Mar. 28, 2017). Since Plaintiffs' claims are the same regardless of what court hears them, the discovery will be the same.[5] Of course the state court and Plaintiffs will work with Defendants to ensure that the litigation schedules avoid excessive burdens.

Even if discovery begins before the appeal is decided, there is still no irreparable harm, since "[d]iscovery is available regardless of whether this case proceeds in state or federal court." *E.g.*, *Grant v. Capital Mgmt. Servs., L.P.,* No. 10cv2471, 2011 U.S. Dist. LEXIS 92863, at *6 (S.D. Cal. Aug. 19, 2011). Nor would state court rulings present "issues of comity," *see* ECF No. 75 at 9. It is not unusual for cases to be removed after substantial state litigation; 28 U.S.C. § 1450 recognizes this and provides that "[a]ll injunctions, orders and other proceedings" prior to removal remain in force unless "dissolved or modified" by the district court. As *Baltimore* concluded, even if remand were vacated on appeal, "the interim proceedings in state court may well advance the resolution of the

[5] Defendants cite cases that arise in very different contexts to claim harm. *See, e.g. Citibank N.A. v. Jackson,* No. 3:16-CV-712-GCM, 2017 U.S. Dist. LEXIS 167155, at *7 (W.D.N.C. Oct. 10, 2017) (costs of class-wide discovery "cannot be later shifted") (citing *Scott v. Family Dollar Stores, Inc.*, No. 3:08-cv-00540, 2016 U.S. Dist. LEXIS 106317 at *2 (W.D.N.C. Aug. 11, 2016); *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) (once "documents are surrendered pursuant to the lower court's order, confidentiality will be lost for all time"). These concerns have no application here.

case in federal court." 2019 U.S. Dist. LEXIS 128168, at *19. *See also Broadway Grill, Inc. v. Visa Inc.*, No. 16-cv-04040, 2016 U.S. Dist. LEXIS 143554, at *5 (N.D. Cal. Oct. 17, 2016).

Denial of a stay pending appeal will not change the fact that, in the unlikely event Defendants prevail on appeal, the Remand Order would be vacated and the case would return to federal court. *See, e.g. Bryan v. BellSouth Communs., Inc.,* 492 F.3d 231, 240 (4th Cir. 2007). Despite Defendants' suggestion, *see* ECF No. 75 at 10, federal courts are fully capable of procuring this result, including by enjoining state proceedings if the state court failed to give effect to the decision reversing remand. *See, e.g. Bryan,* 492 F.3d at 236; *In re Meyerland Co.,* 910 F.2d 1257, 1263 (5th Cir. 1990). Nothing in *Chandler v. O'Bryan,* 445 F.2d 1045, 1057-58 (10th Cir. 1971), says otherwise; it held only that the court could not enjoin a *properly remanded* case.

Nor would any statutory right of appeal be rendered "hollow" absent a stay, ECF No. 75 at 10. Defendants' "appeal would only be rendered moot in the unlikely event that a final judgment is reached in state court before the resolution of their appeal" and "[t]his speculative harm" that "does not constitute an irreparable injury." *Baltimore*, 2019 U.S. Dist. LEXIS 128168,at *17-18. Defendants have failed to show they will suffer irreparable injury absent a stay.

C. The balance of harms weighs in favor of Plaintiffs

A stay would prevent Plaintiffs from seeking prompt redress of their claims. Proceedings in this case have already been delayed well over a year since Plaintiffs filed their complaint. That this case is in its "earliest stages and a stay pending appeal would further delay litigation on the merits of the [Plaintiffs'] claims" "favors denial . . . particularly given the seriousness of the [Plaintiffs'] allegations and the amount of damages at stake." *Baltimore,* 2019 U.S. Dist. LEXIS 128168, *19. *See also Desktop Images v. Ames,* 930 F. Supp. 1450, 1452 (D. Colo. 1996) ("Public policy dictates the timely conclusion of legal disputes.").

Moreover, Defendants' attempted interference with state court proceedings does not support the public interest. *See, e.g. Maui Land & Pineapple Co. v. Occidental Chem. Corp.,* 24 F. Supp. 2d 1083, 1087 (D. Haw. 1998) (noting the public interest in avoiding "interference with state court proceedings and finding "respect for the state court" and "principles of comity" weighed against a stay)(citations and quotations omitted). Delay in Plaintiffs' ability to prepare their case caused by appeal is directly contrary to the public interests at stake in their claims.

CONCLUSION

Defendants have not shown a strong likelihood of success, nor that they will suffer irreparable injury absent a stay, while Plaintiffs will be harmed by further delay, and the public interest weighs against a stay. For the reasons explained above, this Court should deny Defendants' Motion to Stay the Remand Order Pending Appeal.

Dated: September 19, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that on the 19th day of September 2019, I electronically filed a true and correct copy of the foregoing filing with the Clerk of the United States District Court for the District of Colorado using its CM/ECF system and served the same via the CM/ECF system on all counsel of record.

s/ Kevin S. Hannon